IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs CASE NO. SC09-1755

JOSEPH EUGENE MCFADDEN, DCA NO. 4D08-2098

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

On Review from the District Court of Appeal
Fourth District, State of Florida

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PRELIMINARY STATEMENT

Respondent McFadden was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Martin County, Florida. In this brief Respondent McFadden is referred to as such and Petitioner will be referred to as "the State."

"R" represents the record on appeal.

"T" represents the transcripts.

"IB" represents the Petitioner's initial brief.

The Fourth District Court of Appeal's opinion is cited as *McFadden v. State*, 15 So. 3d 755 (Fla. 4th DCA 2009).

STATEMENT OF THE CASE AND FACTS

Respondent McFadden was convicted by a jury as charged of robbery with a firearm (count1), burglary of a conveyance with a firearm (count 2), grand theft (count 3), and aggravated battery (count 4). (R 16, 133-34; T 602-03). The trial court sentenced him as a Prison Releasee Reoffender to life in the Department of Corrections on counts 1 and 2, and to fifteen years on count 4. (T 644-45). The trial court dismissed count 3 grand theft with the State's consent. (T 647-48). On direct appeal, the Fourth District reversed McFadden's convictions and remanded for a new trial. *McFadden v. State*, 15 So. 3d 755, 756-57 (Fla. 4th DCA 2009). This Court granted the State's petition for review based upon conflict jurisdiction.

The issue for this Court's review is whether the State was required by Florida Rule of Criminal Procedure 3.220(b)(1)(B) to disclose to the defense an oral statement made by a listed witness to a deputy, also a listed witness, that was materially different from the witness's statements contained in the disclosed police reports and was used by the State at trial to impeach the witness.

The sum of the State's evidence was that Dell Ritter, Justin Hyatt, and McFadden had a business deal to sell stereo speakers. (T 216, 293). Ritter and McFadden argued about payment. (T 219). According to Ritter and Hyatt, McFadden went into his house and came back out with a sawed-off shotgun. (T 222-23). McFadden beat Ritter with the shotgun while McFadden's friends stole

all the speakers out of Ritter's truck. (T 224, 298). Ritter had a concussion, broken ankle, and various cuts and bruises. (T 226).

McFadden was arrested later the same day. (T 351). After his arrest, McFadden gave a taped statement that differed substantially from Ritter and Hyatt's version. (T 407). McFadden denied any business relationship. (T 433). He said that Ritter and Hyatt came into the neighborhood to buy drugs. (T 433). They approached McFadden and he told them to leave. (T 450, 459). Ritter called McFadden a "N-gger" and McFadden -- a black man -- got upset. (T 459). McFadden and Ritter mutually fought. (T 450, 459). McFadden clearly won the fight and then left to clean up his own cuts. (T 430, 449). McFadden had no idea who entered Ritter's truck while the fight was happening. (T 449).

After the State filed an information against McFadden, it listed several witnesses pursuant to Florida Rule of Criminal Procedure 3.220(b)(1)(A), including Deputy Robert Ray and McFadden's sister Bakesa McFadden. (R 38). As described in a police report provided to the defense, Bakesa called Deputy Ray the day after the crimes and told him that the stolen speakers were hidden in a neighbor's yard. (T 363, 510, 533). The defense deposed Bakesa, but the record does not reflect if Deputy Ray was deposed. (T 534).

Eleven months later, the case went to trial. (T 1). McFadden's defense at trial was that he merely engaged in a mutual fight and had no firearm. (T 414,

423). He came out the clear winner and the victim called the police out of vengeance. (T 414, 423). He developed his defense through his taped statement to police and the testimony of his sister Bakesa McFadden. (T 407, 505; State Exhibit 13).

In its case in chief, the State called Deputy Ray, who testified that he received a phone call from Bakesa the day after the incident. (T 363). She told him the stolen speakers were hidden in a neighbor's yard. (T 364). Deputy Ray was not an officer on the investigation; he worked inside the jail. (T 363). Deputy Ray passed the information on to the appropriate officers and those officers recovered the speakers. (T 364).

McFadden called his sister Bakesa to testify at trial. (T 505). She was outside in their yard when the fight occurred, although she did not see it. (T 506-07). She saw McFadden walk into their house. (T 508). He was not carrying a shotgun or speakers. (T 508). She did not see him leave again. (T 508). This testimony supported McFadden's claim that he entered the house only after the fight to clean his cuts.

At the end of defense counsel's direct examination of Bakesa, they had the following exchange:

> [Defense counsel]: Okay. Um, and do you live in that house with Mister McFadden, correct [sic]?
> [Bakesa McFadden]: Yes.
> [Defense counsel]: Um, if there were a shotgun in the

> home would you know about it?
> [Bakesa McFadden]: I'm very nosy, so I haven't seen anything, my mother has been through there because she, since he's been she had to like get his stuff together and put stuff up, so she hasn't run into anything as well, so.
> [Defense counsel]: Okay. So to your knowledge there is no shotgun in the McFadden household?
> [Bakesa McFadden]: To my knowledge, no.
> [Defense counsel]: There has never been a shotgun in the house to your knowledge?
> [Bakesa McFadden]: There has never been a gun in our house.
> [Defense counsel]: No further questions.

(T 508-09).

At a bench conference following this exchange, the State told the trial court and defense counsel that it intended to impeach Bakesa with a statement she made to Deputy Ray the day *before* the crime. (T 510). According to the prosecutor, on the day before the crimes Bakesa told Deputy Ray that she was concerned because McFadden had a sawed-off shotgun and drugs in the house. (T 510). Defense counsel said that this was the first she had heard of such a conversation. (T 510).

Without asking Bakesa about the prior statement, the State called Deputy Ray in rebuttal.[1] (T 532). Deputy Ray said he spoke with Bakesa the day before the crime. (T 533). She was "concerned" because her brother had a sawed-off

[1] It was improper impeachment to call Deputy Ray to impeach Bakesa without first asking Bakesa about the prior statement. *See* 90.614, Fla. Stat. (2008). Defense counsel did not object to this, however, likely because she was surprised by the impeachment. Respondent did not raise this specific issue in the Fourth District and uses it now only to illustrate the effect of the surprise impeachment.

shotgun in their house. (T 533). (Deputy Ray did not mention that there were also drugs involved. (T 533).) He did not write a report about this conversation. (T 536). He said he was planning to issue a Notice to Appear but did not say for what crime. (T 536). Instead, Deputy Ray gave the information to another officer or detective. (T 536). The record does not reflect who that detective was or whether that detective wrote a report about the incident.

Defense counsel objected that this evidence of a conversation the day *before* the crimes was a discovery violation based upon a "material part of this case." (T 533). The trial court interrupted counsel's argument to interject that rebuttal evidence is not discoverable. (T 533). The State argued "it's not a statement of the defendant" and Bakesa "cho[]se to take the stand and lie." (T 534). The State also noted that it spoke with Bakesa before trial and Bakesa did not add anything to her deposition, although it is not clear what she said in the deposition. (T 534). The trial court overruled the objection and did not hold a *Richardson* hearing. (T 534).

Defense counsel then recalled Bakesa. (T 537). Bakesa agreed that she talked to Deputy Ray the day before the crime, but denied it was about McFadden possessing a shotgun. (T 538, 540). According to her, she complained that a woman with an outstanding warrant was staying with McFadden in the house. (T 538-40). Bakesa was worried her family would get in trouble for allowing the

woman to stay. (T 540).

The jury ultimately convicted McFadden as charged on all counts. (T 602-03). The Fourth District reversed his convictions because, it held, the trial court should have conducted a *Richardson* inquiry into the apparent discovery violation. *McFadden*, 15 So. 3d at 757. The Fourth District stated that it was a discovery violation for the State not to disclose Bakesa's oral statement, even though the statement was not written in any report. *Id.* The Fourth District reasoned that oral statements are implicitly included in those types of statements that the State must disclose to defense under Rule 3.220(b)(1)(B). *Id.* at 757-58.

This Court granted conflict jurisdiction on the issue of whether the State was required to disclose to the defense Bakesa's oral statement made the day before the incident to Deputy Ray.

SUMMARY OF THE ARGUMENT

This Court should approve the Fourth District's decision, reversing McFadden's convictions and remanding for a new trial because the State committed a discovery violation by not disclosing to the defense the oral statement made by Bakesa McFadden to Deputy Ray the day before the crimes.

As a preliminary matter and regardless of how this Court interprets Rule 3.220(b)(1)(B), McFadden should receive a new trial because the trial court did not conduct a *Richardson* inquiry to determine 1) *if* a discovery violation occurred, and 2) how it prejudiced the defense's case. Deputy Ray testified that he did not write a report but instead gave the information about Bakesa's oral statement to another detective or officer. The trial court did not inquire into who that detective was or *whether that detective wrote a report about Bakesa's statement*. The record is devoid of any evidence on this point. If that detective did write a report, it would fall squarely under the established interpretation of Rule 3.220(b)(1)(B) requiring disclosure of oral statements that are memorialized in a police report. The trial court's failure to inquire was not harmless because McFadden was procedurally prejudiced in his trial preparation. Because the trial court did not hold a *Richardson* hearing to determine if there was a discovery violation and how it prejudiced the defense, a new trial is required.

Second, even if Bakesa's oral statement was not contained in any written

report, the State should have disclosed it to the defense according to the discovery principles recognized in *Scipio v. State*. Both Bakesa and Deputy Ray were known witnesses, listed by the State, and the oral statement changed the role of the witnesses in the case. Under these circumstances, Bakesa's oral statement should have been disclosed.

Third, Rule 3.220(b)(1)(B) includes oral witness statements in the types of witness statements that the State must disclose to defense. Although it appears no other court in Florida has interpreted the rule as the Fourth District did, the Fourth District's analysis of the term "includes" is the correct legal meaning. Use of "includes" denotes that the rule's list of statements is only illustrative --not exhaustive -- of the types of statements that must be disclosed to defense. The plain meaning of the rules wording requires disclosure of oral witness statements, even when not memorialized in a writing or recording.

Fourth, policy considerations support interpreting the rule as the Fourth District did to require disclosure of oral statements made by listed witnesses. Requiring disclosure would not hinder law enforcement investigations or the State's prosecution of crimes. Rather, disclosure of oral statements would encourage pretrial investigation of facts and defenses and would focus preparation for the issues to be litigated at trial.

ARGUMENT

RULE 3.220(b)(1)(B) REQUIRED THE STATE TO DISCLOSE THE ORAL STATEMENT MADE BY BAKESA MCFADDEN TO DEPUTY RAY ABOUT THE DEFENDANT POSSESSING A SAWED-OFF SHOTGUN ON THE DAY BEFORE THE CRIME, WHICH THE STATE USED TO IMPEACH BAKESA'S TRIAL TESTIMONY.

Respondent McFadden should receive a new trial because the State's failure to disclose Bakesa's oral statement was a discovery violation. Florida Rule of Criminal Procedure 3.220(b)(1)(B) does not specifically include or exclude oral witness statements from the types of statements that the prosecutor must disclose to the defense. The Fourth District interpreted the rule to include oral witness statements and, thus, to require disclosure of Bakesa's statement.

Interpretation of a rule of procedure is a purely legal question that this Court reviews *de novo*. *State v. Nelson*, --- So.3d ----, 2010 WL 114547, 3, 35 Fla. L. Weekly S34 (Fla. Jan. 14, 2010); *Barco v. School Bd. of Pinellas County*, 975 So. 2d 1116, 1121 (Fla. 2008); *Williams v. State*, 10 So. 3d 660, 661 (Fla. 4th DCA 2009).

Respondent's argument is structured as follows. First, regardless of how this Court interprets Rule 3.220's definitions of "statement" and "includes," the trial court reversibly erred in failing to hold a *Richardson* hearing because it did not determine whether the oral statement of Bakesa was memorialized in a written

report. Second, regardless of how this Court interprets the rule's definitions, and even if Bakesa's oral statement was not contained in any written report, the State should have disclosed it to the defense according to the discovery principles recognized in *Scipio v. State* because the oral statement changed the role of the listed witnesses in the case. Third, Rule 3.220(b)(1)(B) includes oral witness statements as those types of witness statements that the State must disclose to defense. Fourth, policy considerations support requiring disclosure of oral statements.

The State listed both Bakesa McFadden and Deputy Ray as witnesses. (R 38). As far as defense knew, Bakesa's involvement with Deputy Ray was on the day after the crimes when she called him to tell him where the stolen stereo speakers were hidden. (T 363, 510). At trial, McFadden called Bakesa to testify. (T 505). She said that she did not see her brother enter or leave their house with a shotgun or stereo speakers and, as far as she knew, McFadden has never had a gun in their house. (T 508-09).

The State then called Deputy Ray to impeach Bakesa with a statement she gave to Deputy Ray the day *before* this incident occurred, where she told him that she was worried because McFadden had a sawed-off shotgun in the house. (T 532). The State argued that Defense had opened the door to the testimony. (T 510, 534).

Defense counsel objected and claimed a discovery violation because she had received no notice of this prior statement by Bakesa. (T 533). The trial court overruled the objection, did not conduct a *Richardson* hearing, and allowed Deputy Ray to testify in rebuttal. (T 534).

The result was every trial attorney's nightmare: surprise impeachment evidence of the only defense witness who supported the defense. The evidence was meant to impeach Bakesa's credibility on a collateral matter not related to the facts of the crime. But the statement itself implicated McFadden with previously possessing the same weapon used in this crime. Moreover, the impeachment was something that counsel could have avoided if she had known the prior statement existed by simply not asking the last few questions.

Any kind of effective cross-examination of Deputy Ray was hindered by the surprise. For example, Defense counsel began to cross-examine Deputy Ray about the "context" of Bakesa's statement, but the State claimed that would open the door to the fact that the statement referenced drugs, as well. (T 535). Defense counsel simply did not know about the context of the statement or what other doors it might open.

The State argued on appeal that the trial court was right for the wrong reason. According to the State, even though the discovery rules do apply to impeachment and rebuttal evidence, oral statements of a witness do not have to be

disclosed so there was no discovery violation.

The Fourth District held otherwise, reasoning that the State committed a discovery violation because Rule 3.220(b)(1)(B)'s definition of a "statement" that must be disclosed includes oral statements of witnesses. *McFadden*, 15 So. 3d at 757. Although the rule specifically lists only written or recorded statements, its use of the word "includes" means that the definition is an illustrative list of the kinds of statements, not an exhaustive one. The State argues here that the Fourth District's interpretation of the word "includes" is wrong and that oral statements should be excluded. (IB 11).

a. Regardless of this Court's interpretation of the definitions of "statement" and "includes" in Rule 3.220(b)(1)(B), the trial court reversibly erred in failing to hold a *Richardson* hearing because it did not determine whether the oral statement of Bakesa was memorialized in a written report.

Reversal for a new trial is required because the trial court did not hold a *Richardson* hearing to determine whether Bakesa's oral statement fits into the well-accepted definition of a "statement" -- one that is written or recorded in a police report. Deputy Ray stated in cross-examination that he did not write a report about his conversation with Bakesa the day before the crimes but he gave the information to another detective. If that detective wrote a report about Bakesa's statement, it would fit squarely in the generally accepted definition of a "statement" that must be disclosed. Due to the lack of a *Richardson* hearing

clarifying the discovery violation, a reversal for new trial is required.

When a discovery violation is alleged, the trial court must determine, first, if a violation of the discovery rules occurred and, second, whether the violation was "inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971). *See Giles v. State*, 916 So. 2d 55, 57 (Fla. 2d DCA 2005).

This Court has stated that the trial court's denial of a request for a *Richardson* hearing is reviewed for abuse of discretion. *Evans v. State*, 995 So. 2d 933, 953 (Fla. 2008) (citing *Conde v. State*, 860 So. 2d 930, 958 (Fla. 2003) (holding that the trial court's decision *on the merits* of the *Richardson* hearing is subject to abuse of discretion)). However, "the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances." *Barrett v. State*, 649 So. 2d 219, 221-22 (Fla. 1994); *Stimus v. State*, 886 So. 2d 996, 997 (Fla. 5th DCA 2004); *Acosta v. State*, 856 So. 2d 1143, 1144 (Fla. 4th DCA 2003); *Felton v. State*, 812 So. 2d 525, 526 (Fla. 2d DCA 2002). It appears that a trial court must hold a *Richardson* hearing before it can adequately exercise its discretion.

"There is neither a rebuttal nor an impeachment exception to the *Richardson* rule." *Charles v. State*, 903 So. 2d 314, 316-17 (Fla. 2d DCA 2005) (citing

Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993)).

Florida Rule of Criminal Procedure 3.220(b)(1)(B) specifically requires disclosure of "any statement of any kind or manner summarized in any writing or recording. The term 'statement' is specifically intended to include all police and investigative reports . . ." If a detective wrote a report about Deputy Ray's conversation with Bakesa, it would qualify under the above definition.

In *Giles v. State*, 916 So. 2d at 57, the court held that it was reversible error for the trial court not to hold a *Richardson* inquiry to determine whether police reports contained the undisclosed evidence at issue. The defendant was charged with dealing in stolen property. *Id.* at 56. The state alleged that Giles pawned tools that he had stolen from his employer. *Id.* On cross-examination, the lead detective testified that Giles had pawned other tools at the same pawnshop in the same general time frame. *Id.* at 57. At a bench conference, defense counsel told the trial court that this was the first he had heard of other items being pawned, and he asked for a *Richardson* hearing. *Id.* The trial court asked the prosecutor whether the police reports reflected these additional transactions. *Id.* The prosecutor said they did not. *Id.* The trial court denied defense counsel's request to hold a *Richardson* inquiry. *Id.* The Second District reversed. *Id.* at 58.

Regarding the first step -- determining whether there was a discovery violation -- the Second District said that the trial court correctly started this inquiry

by asking the prosecutor about police reports that might reflect the additional pawns. *Id.* The trial court erred, however, in failing to ask the detective whether *he* had any reports that reflected the additional pawns (i.e., reports that might not have been provided to the prosecutor). *Id.*

The instant case is similar. Deputy Ray testified that he spoke with Bakesa about the sawed-off shotgun on the day before the crimes; he did not write a report but did give the information to another detective. (T 536). The court did not ask Deputy Ray the name of the detective or question that specific detective about whether he wrote a report.

If that detective did, in fact, write a report about Deputy Ray's conversation with Bakesa, it would be a "statement" under Rule 3.220(b)(1)(B), according to the established understanding of the definition. (IB 13). *See e.g. State v. Evans*, 770 So. 2d 1174, 1180 (Fla. 2000). Discovery in the possession of law enforcement is in the constructive possession of the State and the State's failure to disclose it to defense is a discovery violation. *Laidler v. State*, 10 So. 3d 1136, 1139 (Fla. 1st DCA 2009); *Tarrant v. State*, 668 So. 2d 223, 225 (Fla. 4th DCA 1996).

The State takes the position in its initial brief that "the trial court inquired into the issue and ultimately determined that no discovery violation had taken place." (IB 10). That is not correct; the trial court did not conduct a *Richardson* hearing because it erroneously believed that the discovery rules do not apply to

impeachment or rebuttal evidence. (T 533-34). The trial court did not inquire into whether the Bakesa's oral statement was included in some written report, when the prosecutors learned of the statement, why they did not disclose the statement earlier, whether the statement was material to the defense case, or what prejudice the defense suffered.

The failure to hold a *Richardson* hearing is subject to harmless error review. *State v. Schopp,* 653 So. 2d 1016, 1021 (Fla. 1995). The harmless error inquiry in this context focus on whether the defendant's trial preparation or strategy could have been different if he had known of the withheld discovery. *Scipio v. State*, 928 So. 2d 1138, 1145 (Fla. 2006); *Schopp*, 653 So. 2d at 1020. "[O]nly if the appellate court can determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." *Scipio*, 928 So. 2d at 1150.

McFadden was prejudiced in his preparation for trial by the non-disclosure of Bakesa's statement. Had Defense counsel known about Bakesa's prior statement, she would likely not have asked Bakesa the questions about whether McFadden ever had a gun in their house. Perhaps Defense counsel would not have called Bakesa, at all. Defense counsel may have called a different family member to testify about whether McFadden kept a gun in the house. There are several different strategies defense counsel could have employed to prepare differently had

she known about the undisclosed statement. The State cannot show beyond a reasonable doubt that defense counsel's trial preparation would not have been different.

The State claims that any failure to find a discovery violation was harmless because defense counsel attempted to rehabilitate Bakesa after Deputy Ray impeached her. (IB 21). When recalled, Bakesa denied ever making the earlier statement. (T 538). Nevertheless, this "rehabilitation" merely pitted Bakesa's credibility against Deputy Ray's -- the credibility of the convicted-felon-sister-of-the-accused against a Sheriff's deputy. This was all Defense counsel could do once the impeachment evidence was admitted. It does not mean that Defense counsel would have prepared the case the same way if she had known about the statement beforehand. The difference is similar to trying to put out a wildfire once it has started versus never using flammable material to begin with.

Moreover, Bakesa's version of the conversation, which she gave to "rehabilitate" the impeachment, was prejudicial to McFadden in its own way. Bakesa's explanation was that McFadden had a woman with an outstanding warrant staying at their house and Bakesa did not want the family to get in trouble. (T 538, 540). That explanation adds another irrelevant bad act to the jury's impression of McFadden; it does not "rehabilitate" Bakesa's credibility.

The State also claims that the impeachment evidence was cumulative or

corroborative because McFadden said in his videotaped statement that his father might have an old rifle in the house. (IB 21-22). The statement McFadden made is not the same as Bakesa telling Deputy Ray she was "concerned" because McFadden possessed a sawed-off shotgun on the day before the crime. (T 533). First, Bakesa was impeached with her own prior inconsistent statement. The impact of impeachment by her own words is much greater than McFadden saying their father might have an old rifle somewhere. Second, Bakesa's statement was that McFadden possessed a sawed-off shotgun -- the same weapon alleged in the charged crimes. It implies that he likely had the same gun while committing the charged crimes. Third, a sawed-off shotgun and a rifle are two different types of guns. Mere possession of a sawed-off shotgun is illegal because it is such a dangerous weapon. §§790.001(10) and 790.221, Fla. Stats. (2007).

Similarly, the State's argument that Defense counsel opened the door to this impeachment of Bakesa is disingenuous. (T 511). Opening the door presumes knowledge that the door is there. *Harris v. State,* 945 So. 2d 584, 585-86 (Fla. 4th DCA 2006). Counsel could not open a door she did not know existed. Had counsel known about the prior statement, she likely would not have asked the questions that subjected Bakesa to impeachment.

In sum, a new trial is required because the trial court failed to inquire into whether a discovery violation occurred. While Deputy Ray did not include

Bakesa's statement in a report, the trial court did not inquire if the detective who Deputy Ray gave the information to did write a report. The State seems to agree, in principle, that if the statement were contained in that detective's report, it had to be disclosed. (IB 13). The error of not holding a *Richardson* inquiry was not harmless because it could have procedurally prejudiced the defense's trial preparation. Thus, regardless of this Court's evaluation of the Fourth District's analysis, McFadden should receive a new trial.

b. Even if Bakesa's oral statement was not contained in any written report, it should have been disclosed to the defense according to the principles of *Scipio* because both Bakesa and Deputy Ray were listed known witnesses, and the oral statement changed their roles in the case.

Even assuming that there was no written report about Bakesa's oral statement, the State should have disclosed the oral statement based upon the facts of this case and the principles of continuing disclosure described in *Scipio v. State*, 928 So. 2d at 1145. When the State lists a witness and provides a report about that witness's involvement in the case, it should be required to also disclose oral statements made by that witness that change the nature of the witness's involvement. As with the above argument, this argument applies regardless of this Court's interpretation of Rule 3.220(b)(1)(B)'s definition of "includes."

This Court has already decided that oral witness statements must be disclosed under Rule 3.220 when they change the role of the witness in the case.

In *State v. Evans*, 770 So. 2d at 1182, a murder case, the Court held that the State should have disclosed the oral statement of a witness who changed her testimony. The witness was listed on the State's discovery. *Id.* at 1176. She initially told police that she did not see the crime. *Id.* At trial she testified that she saw the defendant shoot the victim. *Id.* She told the prosecutor her changed story a month before trial, but they did not disclose the change to the defense. *Id.* This Court held that the State's withholding of the change in testimony was tantamount to failing to disclose a witness at all because it transformed her from a know-nothing witness into an eyewitness to the crime. *Id.* at 1182.

In *Scipio v. State*, 928 So. 2d at 1145, also a murder case, this Court held that the State was required to disclose the oral statements of a witness that changed the substance of his previously known statements. An investigator testified in deposition that he saw a pistol by the victim's body at the crime scene and he had turned the gun over to other officers. *Id.* at 1140. The defense intended to rely on the investigator's testimony to cast doubt on whether the defendant was the shooter. *Id.* Prior to trial, the prosecutor showed the investigator crime scene photos, with the result that the investigator realized that the object he thought was a pistol was really a pager. *Id.* at 1140-41. The State did not tell the defense of the investigator's oral change of statement. *Id.*

The defense called the investigator at trial, as planned, and was completely

blindsided by his testimony that there was no gun, only a pager. *Id.* at 1141. Although defense tried to impeach the investigator with his prior deposition statement, the investigator explained that he had been mistaken during his deposition. *Id.*

The State argued to this Court that it was not obligated to disclose the new oral statement by the investigator because it was not written or recorded. *Id.* at 1142. This Court held that the State had a continuing discovery obligation to disclose the material change after the investigator's deposition, regardless of the form of the changed statement. *Id.* at 1142. *See also Smith v. State*, 7 So. 3d 473, 506 (Fla. 2009) ("The fact that Walker's recantation of his deposition testimony was not reduced to writing did not relieve the State of its continuing discovery obligation as to this witness.").

By contrast, in *Bush v. State*, 461 So. 2d 936, 938 (Fla. 1984), this Court held that there was no discovery violation when the prosecutor did not divulge a detective's oral change of testimony. The detective first said in deposition that a witness did not identify the defendant's photo; at trial the detective testified the witness did identify the defendant's photo. *Id.* The detective blamed the discrepancy in his statements on the form of the defense attorney's questions. *Id.* This Court held that the difference in testimony was not something the prosecutor was required to disclose ahead of time. *Id.* In such cases, the defense can always

impeach the witness with the inconsistent statements. *Id.* In sum, there was an adequate remedy in the form of impeachment through the rules of evidence.

One common thread between *Evans* and *Scipio* -- but not *Bush* -- is that no amount of cross-examination or impeachment overcomes the magnitude of impact that the unknown oral statements had on the defendants' cases. *Scipio*, 928 So. 2d at 1142 n.2. In *Evans*, the oral statement was an eyewitness account of the crime; in *Scipio*, the oral statement destroyed the defense's arguments for reasonable doubt. In both cases, the defendants proceeded to trial in good-faith reliance on the witnesses' known statements. Indeed, in *Scipio* -- as in the instant case -- the defense called the witness to testify when the State did not. And in each case the defense learned in the middle of trial that the witnesses had a substantially different role in the case than previously thought.

"[W]e have repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context. . . This Court has explained that the rules of discovery are intended to avoid surprise and 'trial by ambush.'" *Scipio,* 928 So. 2d at 1144. McFadden acknowledges that Bakesa's earlier oral statement is not changed testimony. However, some discovery omissions are so damaging to the defense that they violate the purpose and spirit of the discovery rules. This is such a case.

The result here is that the discovery disclosed by the State portrayed Deputy Ray as essentially a do-nothing, know-nothing witness who merely took Bakesa's phone call about stolen speakers and passed her information along to detectives. The undisclosed evidence made Deputy Ray a witness who had a substantive conversation with Bakesa about McFadden's use of a dangerous weapon that was also used in this crime.

Even without a more expansive reading of the definition of "statement" in Rule 3.220, these facts fit within the rubric of *Evans* and *Scipio*. While not strictly changed testimony, the undisclosed oral statement of Bakesa changed the roles of Bakesa and Deputy Ray in the case. It also changed the dynamic of McFadden's defense. Defense counsel was unaware of these changes until she was in the middle of trial, indeed had already presented her defense and was dealing with the ramifications of the undisclosed statement.

At that point, counsel's trial tactics and strategy were set in stone. Had she known about the different roles of these witnesses, she likely would have prepared for trial differently. At a minimum, the damage of impeachment could have been avoided had she known about Bakesa's prior statement.

Based upon the above analysis, McFadden should receive a new trial because the State committed a discovery violation by not disclosing Bakesa's oral statement that materially changed the roles of the witnesses. The non-disclosure

was clearly prejudicial to the defense's preparation.

c. Rule 3.220(b)(1)(B) includes oral witness statements as those types of statements that the State must disclose to defense.

When interpreting Rule 3.220(b)(1)(B), the first is whether it can be read to support the Fourth District's interpretation. The inquiry hinges on the meaning of the word "includes" in Rule 3.220(b)(1)(B)'s definition of a "statement" that must be disclosed by the State in discovery. Rule 3.220(b)(1)(B) defines a "statement" as:

> The term "statement" as used herein *includes* a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, *but shall not include* the notes from which those reports are compiled.

(emphasis added).

Black's Law Dictionary defines "include" as: "To contain as a part of something. The participle *including* typically indicates a partial list . . . But some drafters use phrases such as *including without limitation* and *including but not limited to* -- which mean the same thing." *Black's Law Dictionary* 766 (7th ed. 1999) (emphasis in original). The New Oxford American Dictionary similarly defines "include" as: "1 comprise or contain *as part of a whole* . . . 2 make part of

a whole or set." *The New Oxford American Dictionary* (2d ed. 2005) (emphasis added). The American Heritage Dictionary defines it as: "1. To take in as a part, an element, or a member. 2. To contain as a secondary or subordinate element. 3. To consider with or place into a group, class, or total." *The American Heritage Dictionary* 913, Houghton Mifflin Co. (3d ed. 1996).

The definition cited by the State in its initial brief is similar. (IB 11). Merriam-Webster Online Dictionary defines "include" as: "2 : to take in or comprise *as a part of a whole* or group 3 : to contain between or within." http://www.merriam-webster.com/dictionary/include, February 16, 2010. (emphasis added). The State highlights the word "comprise" to refute the Fourth District's reasoning, but ignores the rest of the definition "as a part of a whole or group," which supports the Fourth District's analysis.

One legal writing commentator has stated:

> [I]ncluding is sometimes misused for *namely*. But it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, 'It is hornbook law that the use of the word *including* indicates that the specified list ... is illustrative, not exclusive.' *Puerto Rico Maritime Shipping Auth. v. I.C.C.*, 645 F.2d 1102, 1112 n. 26 (D.C.Cir.1981).

Bryan A. Garner, *A Dictionary of Modern Legal Usage* 431 (2d ed. 1995) (emphases in original). *See also People v. Perry*, 224 Ill.2d 312, 331 (Ill. 2007) (citing the above quotation with approval). The Fourth District in its opinion also

cited several cases that support its reading of "include" as an illustrative list, not an exhaustive one. *McFadden*, 15 So. 3d at 757 n.1.

Based upon the plain meaning of "include," the definition of "statement" is an illustrative list, not an exhaustive one. By comparison in *Watson v. State*, 651 So. 2d 1159 (Fla. 1994), -- a case relied upon in the State's initial brief -- the Court interpreted a prior incarnation of Rule 3.220 which read:

> The term "statement" as used herein *means* a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a *substantially verbatim recital of an oral statement* made by said person to an officer or agent of the State and *recorded contemporaneously with the making of such oral statement* . . .

Fla. R. Crim. Proc. 3.220(a)(1)(ii) (1988) (emphasis added). The Court held in *Watson* that the State did not have to disclose the oral statement of a witness that was not contemporaneously recorded substantially verbatim. *See Breedlove v. State*, 413 So. 2d 1, 4-5 (Fla. 1982) (holding that the State did not have to disclose an investigator's written summary of a witness's oral statement because the summary was not substantially verbatim and recorded contemporaneous to when the oral statements were made).

The terminology of the current rule is significantly changed. *See* Fla. R. Crim. Proc. 3.220, 1989 Amendment. It now uses the word "includes" instead of "means." "Means" indicates that the given definition of "statement" was

exhaustive. The American Heritage Dictionary defines it as "1.a. To be used to convey; denote." *The American Heritage Dictionary* 115, supra. The change in the current rule to "includes" incorporates other types of statements than previously specified. It also no longer specifies that oral statements are only subject to disclosure when written or recorded substantially verbatim. The implication is that oral statement may be disclosed in other situations.

The current rule specifically excludes only one type of statement: the notes of police or investigative officers. The rule does not specifically exclude oral statements by witnesses that are not written or recorded.[2]

It appears then that the Fourth Districts reading of Rule 3.220(b)(1)(B) is supported by the textual meaning and is actually the preferred legal reading. The "rule of lenity" compels that any ambiguity in the wording of the Rule be read in favor of the defendant. *See Lewis v. State*, 574 So. 2d 245, 246 (Fla. 2d DCA 1991) (applying statutory rule of construction to criminal procedure rule). As a result, the rule includes oral statements that are not contained in a written report or recording.

[2] Respondent acknowledges it appears to be an inherent contradiction to argue that officers' notes do not have to be disclosed but statements that they hear and remember do have to be disclosed. Respondent addresses the distinction in sub-argument d.

d. Rule 3.220(B)(1)(B) should require disclosure of oral witness statements.

Respondent proposes that this Court interpret Rule 3.220(b)(1)(B) to require the State to disclose all statements of witnesses listed according to Rule 3.220(B)(1)(A). Or, stated another way, there is no reason to exclude oral witness statements from disclosure.

A historical analysis of Rule 3.220(b)(1)(B) shows that there is no reason for excluding oral statements from disclosure that is consistent with the aims of Florida's discovery rules. This Court has repeatedly emphasized full and fair pretrial discovery is necessary for investigation of the case and defenses, as well as preparation for the issues at trial. *Scipio*, 928 So. 2d at 1144; *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981); *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980); *Kilpatrick v. State*, 376 So. 2d 386, 388 (Fla. 1979).

Prior to 1989, Florida's discovery rule incorporated the same definition of "statement" found in the Federal Rules. *See* Fla. R. Crim. Proc. 3.220(a)(1)(ii) (1988) (Committee Notes, 1972 Revision). The former definition of "statement" was based upon 18 United States Code section 3500. *See also* Fed. R. Crim. Proc. 26.2(f). It limited disclosure of oral statements to "a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . ." Fla. R. Crim. Proc. 3.22(a)(1)(ii).

While Florida relied on the Federal rule's wording as a model, Florida did not subscribe to the Federal rationale for discovery rules. One distinction between the Federal rule and the former Florida rule was that Florida required pretrial disclosure of witness statements, while the Federal rule required disclosure at trial only after the witness testified on direct examination. *Compare* Fla. R. Crim. Proc. 3.220(a) (allowing discovery "[a]fter the filing of the charging document") *with* 18 U.S.C. § 3500(a) (providing no disclosure of a prosecution witness's statement "until said witness has testified on direct examination in the trial of the case").

The United States Supreme Court explained that the reasoning behind the Federal rule is to allow the defense an opportunity to impeach the trial testimony. *Palermo v. U.S.*, 360 U.S. 343, 349 (1959). The oral statements must be verbatim so they are not distorted or taken out of context when used to impeach the witness. *Id.* at 352. An additional aim in excluding non-verbatim summaries of oral statements was to protect from disclosure the police officer's impressions, interpretations and investigative process contained in their reports or notes. *Id*. at 350.

By contrast, Florida allows pretrial discovery for purposes of investigating the case and possible defenses and to prepare for trial, not merely for impeachment at trial. *State v. Belvin*, 986 So. 2d 516, 524-25 (Fla. 2008); *Kilpatrick*, 376 So. 2d at 388; *Bell v. State*, 930 So. 2d 779, 787 (Fla. 4th DCA 2006). Anything that may

lead to admissible evidence is relevant for discovery purposes. *Franklin v. State*, 975 So. 2d 1188, 1189 (Fla. 1st DCA 2008). Clearly, any statement made by a witness is relevant for discovery purposes of investigation and preparation for trial, regardless of whether an oral statement was written or recorded verbatim.

In 1989, the definition of "statement" in Rule 3.220(b)(1)(B) was changed to its current form, which is more consistent with Florida's pretrial discovery. But, the State's argument for excluding oral statements from discovery ignores the value of oral statements for investigative and preparation purposes. The State's interpretation of the rule -- and the cases the State cites -- rely on the logic of the pre-1989 definition. This old rationale is inconsistent with Florida's pretrial discovery.

There would be no hindrance to law enforcement's investigation or the State's prosecution of crimes by requiring disclosure of oral witness statements. Indeed, disclosure of more information pretrial would assist in prosecuting those who are guilty of crimes while exonerating those who are innocent. The State gives three reasons in its initial brief for not requiring the prosecutor to disclose oral witness statements. First, it would be an undue burden on the prosecutor to recount the substance of every conversation he has about the case. (IB 15). Second, it would violate the work product privilege by giving insight into the prosecutor's opinions about the evidence. (IB 16). Third, the State submits that an

oral witness statement should be viewed akin to investigative notes of a police officer, which are specifically excluded from disclosure. (IB 12). None of these reasons, however, hinder the ability to investigate and prosecute crimes.

First, there would be no undue burden on prosecutors by expecting them to disclose the substance of oral witness statements. In this case, the prosecutors would simply have had to tell defense counsel that Deputy Ray spoke with Bakesa the day before the incident and she said McFadden had the shotgun. Or when Deputy Ray told the prosecutors that he had the prior undisclosed conversation with Bakesa, the prosecutors could have told him to write a supplemental report that they could give to the defense.

In either situation, defense counsel could then have talked to Deputy Ray before trial or redeposed him. At a minimum, defense counsel would have known not to ask the question of Bakesa whether her brother had a shotgun in the house.

In general, there would be no undue burden to prosecutors by expecting them to disclose the substance of oral witness statements. The State argues that it would "require the prosecutor to record and disclose virtually any case related conversation with an investigator." *Burkes v. State*, 946 So. 2d 34, 37 (Fla. 5th DCA 2006). (IB 15). That is an exaggeration, to say the least. Presumably, the substance of most witnesses' statements will not change no matter how many times they repeat it. Therefore, once the prosecutor discloses the substance of the

statement, his duty would be complete unless the witness materially changed his story -- that is already required by *Evans* and *Scipio*.

Despite the dicta in *Burkes* that supports the State's argument, the actual facts and holding are distinctly different from the instant case. *Id.* at 37. In *Burkes*, a DUI manslaughter case, the defense called an expert witness to testify at trial that he examined the paint marks on the roadway left by investigators who responded to the crash and, from these, he was able to reconstruct the accident. *Id.* at 35-36. The prosecutor had the lead investigator go back to the scene, while the defense was presenting it's case, to see if the marks were still on the road. *Id.* at 36. The prosecutor then called the investigator who testified that the marks were not on the road, that he would not expect them to be there because they only last a few months, and that the marks would have been long gone before the defense expert went to look at them. *Id.* The investigator's new testimony was not disclosed to the defense before he testified. *Id.* The Fifth District held that the prosecutor did not have to disclose the investigator's subsequent investigation and oral statements because the investigator did not write them in a report. *Id.* at 37. The court noted that the investigator's continuing investigation and subsequent oral statement were a response to a defense witness's previously undisclosed expert trial testimony. *Id.*

By contrast in the instant case, the State knew that Bakesa was going to

testify for the defense and the State also knew prior to her testimony that she allegedly had this impeaching conversation with Deputy Ray. (R 38; T 534). The undisclosed statement was between two known witnesses about the defendant's dangerous behavior involving the same weapon. Bakesa was not a surprise witness and Ray's testimony was not based on further investigation done after hearing Bakesa's testimony, as were the facts in *Burkes*. There simply would have been no undue burden on the prosecutor to disclose the statement Bakesa made to Deputy Ray.

The State's rationale -- that the statement should be disclosed if written in a report but not disclosed if not written in a report -- is contrary to the purpose of discovery in Florida. It shields relevant facts from disclosure. It discourages openness in favor of secrecy and encourages gamesmanship instead of justice. Indeed, for law enforcement officers it is simply bad practice not to write reports about oral witness statements because it leaves the officer's open to forgetfulness, even without any intent to hide facts or embellish.

Second, there is no threat to the work product privilege by requiring the State to disclose oral witness statements. The discovery rule already specifically exempts work product from disclosure. Fla. R. Crim. Proc. 3.220(g)(1). "Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or

conclusions *of the prosecuting or defense attorney or members of their legal staff.*" Id. (emphasis added).

The work product privilege protects the substance of conversations between witnesses and attorneys -- not between two different listed witnesses. *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* defines work product privilege as "oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." *Id.* at 497. The other cases cited by the State for the work product privilege similarly apply to statements made to an attorney, not to another witness. *See Eagan v. Demanio,* 294 So. 2d 639 (Fla. 1974); *Olson v. State*, 705 So. 2d 687 (Fla. 5th DCA 1998); *State v. Rabin*, 495 So. 2d 257 (Fla. 3d DCA 1986). Work product is meant to protect *the attorney's impressions* of the oral statement, not to protect the witness's statement itself. *Id*. at 263. Moreover, any work product privilege ceases when the party intends to use the privileged statement as impeachment. *Dodson v. Persell*, 390 So. at 707; *D.M.L. v. State*, 976 So. 2d 670 (Fla. 2d DCA 2008); *Am. Motors Corp. v. Ellis*, 403 So. 2d 459, 463 (Fla. 5th DCA 1981).

The oral statement at issue here is not privileged work product. Bakesa, a listed witness, made the undisclosed oral statement at issue here to Deputy Ray, a listed law enforcement witness. McFadden does not claim a right to discover what

Deputy Ray said to the prosecutors. He claims a right to know what Bakesa said to Deputy Ray.

The absence of work product in the instant case is clear. Deputy Ray testified as rebuttal impeachment of Bakesa because Deputy Ray had the personal knowledge of Bakesa's earlier statement. *See* § 90.604, Fla. Stat. (2007). The prosecutors did not -- and could not -- testify themselves. *See also Olson*, 705 So. 2d at 690-91 (holding that prosecutors could not testify about their charging decisions because they were privileged as work product).

Work product privilege does not apply to the situation in the instant case, where a lay witness makes an oral statement to a police officer witness. And the majority of such oral witness statements are likely to be made to law enforcement officers. The officer's failure to write the oral statement down should not be a shield to disclosure. When the prosecutor learns of the witness's oral statement, he should disclose it to the defense -- or better yet, have the officer compose a supplemental report about the statement or the witness herself write a supplemental written statement.

Third, the State suggests that oral witness statements should be considered as police notes, which are specifically excluded from disclosure under the current rule. This argument implicitly analogizes investigator notes -- and oral statements made to investigators -- to attorney work product. This exclusion appears to be a

vestige of the Federal rationale discussed in *Palermo*, that disclosure of the investigator's notes would "reveal the inner workings of the investigative process" by showing the officer's interpretations and impressions. *Palermo,* 360 U.S. at 350. This is a more applicable argument to the instant case than attorney work product. Nevertheless, it is still incorrect.

Bakesa's oral statement was a fact. Deputy Ray testified to it. He recounted what she said. Deputy Ray did not testify to his interpretations, impressions, or insight into the investigative process. The disclosure to defense should have been the same as his testimony. If the State's position is that the witness's oral statement cannot be disclosed without giving the officer's interpretation, impression or insight into the investigative process, then it is not properly admitted as testimony. *See* § 90.701, Fla. Stat. (2008) (outlining when non-expert opinion testimony is admissible). *Cf. Olson*, 705 So. 2d at 690-91.

McFadden's position is not that any police notes, impressions, interpretations, or insights should have been disclosed, but *the fact* of Bakesa's statement to Deputy Ray should have been disclosed. Otherwise, Deputy Ray could not testify to it.

It defies logic -- and the point of the discovery rules -- to allow an officer to shield factual information from disclosure by writing it in his notes or keeping it in his head, rather than writing it in a report. The determining factor should not be

whether it was written somewhere. The determining factor should be whether it is a fact of the case or an opinion, comment, or insight of the officer.

An example of what should be disclosed is a hypothetical case where a murder occurs on the street in a high-crime neighborhood. Law enforcement will likely talk with people who live in the neighborhood or hang out on the street -- people who did not witness the crime themselves but have heard rumors about who committed it. Those rumors may lead officers to other people with knowledge and evidence of the crime. The people who heard rumors may not be witnesses under Rule 3.220(b)(1)(A); they have no first-hand knowledge, the State does not list them, they do not testify -- and thus, their statements to police do not have to be disclosed to defense under Rule 3.220(b)(1)(B). The people with knowledge of the crime, however, are witnesses under Rule 3.220(b)(1)(A). They are listed by the State and likely testify at trial. It is the oral statements of those listed witnesses that should be disclosed to the defense under Rule 3.220(b)(1)(B), regardless of whether they are contained in a writing or recording.

Requiring disclosure of oral witness statements, whether they are written in a report or not, would alleviate some pressure on law enforcement officers. Officers would not have to decide what facts to include in reports. It would encourage them to include all statements in their reports because there would be no tactical reason to leave some statements out. The result for law enforcement would

be increased thoroughness and reduced forgetfulness or embellishment. And of course, it would discourage officers -- and prosecutors -- from trying to game the system by purposely omitting oral statements from their reports, only to surprise the defense with them at trial.

Interpreting Rule 3.220(b)(1)(B) to require that all statements of listed witnesses must be disclosed to the defense is consistent with both the letter of the discovery rules and their purpose. It provides the defense an opportunity to investigate the facts and defenses and prepare for trial. Requiring disclosure would not prejudice the State's trial preparation. To the contrary, disclosure of oral statements would lead to more focused litigation of the material issues at trial. It would also prevent any inclination toward gamesmanship or artifice. This is exactly what the discovery rules are meant to do.

In sum, the State committed a serious discovery violation by not disclosing Bakesa's oral statement to Deputy Ray. The violation was prejudicial to the defense's trial preparation. This Court should affirm the Fourth District's decision, granting McFadden a new trial because of the discovery violation.

CONCLUSION

WHEREFORE, Respondent asks this Court to approve the Fourth District's reversal for a new trial and hold that the State was required to disclose to the defense the oral statement of Bakesa McFadden to Deputy Ray that it used to impeach Bakesa's trial testimony. If this Court decides to reverse the Fourth District's opinion granting Respondent a new trial, it should remand to the Fourth District for reconsideration of the other grounds raised in his direct appeal, which the Fourth District did not address because it reversed on the discovery issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to MYRA J. FRIED, Assistant Attorney General, 1550 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, on this 1st day of March, 2010.

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Attorney for Joseph Eugene McFadden

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 14 point Times New Roman.

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Of Counsel